No. 17-1625

IN THE
Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,

Petitioners,

v.

ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Copyright Act's allowance of "full costs" (17 U.S.C. § 505) is limited to the categories and amounts of costs taxable under 28 U.S.C. §§ 1920 & 1821, or also authorizes an award of expert witness fees and other "non-taxable" expenses.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the case below are named in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Rimini Street, Inc. is a publicly traded Delaware corporation. Rimini Street, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONERS

Petitioners Rimini Street, Inc. and Seth Ravin respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed insofar as it affirmed the award of $12,774,550.26 in non-taxable expenses to respondents Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation.

OPINIONS BELOW

The opinion of the court of appeals (JA311–46) is reported at 879 F.3d 948. The district court's post-trial opinion (JA278–308) is reported at 209 F. Supp. 3d 1200; its judgment (JA276–77) is unreported.

JURISDICTION

The court of appeals entered judgment on January 8, 2018, and denied a timely petition for rehearing on March 2, 2018. JA347–48. The petition for a writ of certiorari was filed on May 31, 2018, and granted on September 27, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 17 U.S.C. § 505 provides:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

This provision, as well as 28 U.S.C. §§ 1821 & 1920, are reproduced in the Addendum to this brief.

STATEMENT

After a jury trial, petitioner Rimini was found liable for "innocent" infringement of copyrights held by the Oracle respondents, while petitioner Ravin was exonerated of all liability under the Copyright Act. The district court exercised its discretion to award respondents all of their "taxable" costs—*i.e.*, those enumerated in 28 U.S.C. §§ 1920 & 1821—in the amount of $4.9 million, as well as $28.5 million in attorneys' fees. JA304–05; *see* 17 U.S.C. § 505 ("the court in its discretion may allow the recovery of full costs" and "may also award a reasonable attorney's fee to the prevailing party as part of the costs"). The district court *also* awarded $12.8 million in "non-taxable" expenses—*i.e.*, expert witness fees and other litigation expenditures that are not recoverable under 28 U.S.C. §§ 1920 & 1821. JA306. As pertinent here, the court of appeals reduced the taxable cost award to $3.4 million because of a mathematical error and affirmed the award of non-taxable expenses. JA345–46.

1. "At common law, costs were not allowed." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Beginning with the Statute of Gloucester, 6 Edw. I, c. 1 (1278), cost-shifting was accomplished first in England and then in America only by statute. *See* 10 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2665 (3d ed. April 2018). Without statutory authorization, courts cannot shift costs from one litigant to the other.

The first English copyright statute, the Statute of Anne, provided that the prevailing defendant in a copyright case "shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath." 8 Anne c. 19, § 8 (1710); *see also* English Copyright Act of 1842, 5 & 6 Vict., ch. 45,

§ 26. The phrase "full costs" appears in English statutes as early as 1665 (*see* 17 Car. II, ch. 7, §§ 1–3 ("full Costs of Suite" in replevin actions)), and courts in England consistently interpreted the phrase "full costs" to mean the same as "ordinary costs"—a narrowly defined subset of litigation expenses, frequently referred to as "party and party" costs. *See Jamieson* v. *Trevelyan*, 24 Law Tim. Rep. 222, 222–23 (1855) (Pollack, C.B.) ("the terms 'full costs' and 'costs' mean the same thing").

When English courts said they would tax "what are known as costs 'between party and party,'" that phrase described the *scope* of costs shifted to the losing litigant. *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939). Costs taxed as "between party and party" were only "a fixed allowance for the various steps in a suit" (*ibid.*) and were limited by statute.

The alternative mode of taxation, which permitted a court to award "as much [as] the entire expenses of the litigation of one of the parties ..., [was] technically known as costs 'as between solicitor and client.'" *Sprague*, 307 U.S. at 165. To authorize the shifting of additional expenses, English statutes provided such broader authorizations as "full costs *and expenses*" (8 & 9 Vict., ch. 18, § 126 (1845) (emphasis added)) or "all costs, *charges, and expenses*" (12 & 13 Vict. ch. 106 (1849) (emphasis added))—phrases understood to provide the winning party a "full indemnity" or the ability to tax the costs "as between attorney and client." *Avery* v. *Wood & Sons*, 65 Law Tim. Rep. 122, 123–24 (1891); *see* John Gray, *A Treatise on the Law of Costs in Actions & Other Proceedings in the Courts of Common Law at Westminster* 186 (1853).

By the mid-19th century in England, it was "established" that when a court awarded costs in the

mode of "party and party," "no costs [were] allowed ... for expenses incurred in informing the minds of witnesses and supplying them with data whereon to ground an opinion" (Gray, *A Treatise on the Law of Costs*, *supra*, at 502)—what we today would call expert witness fees. *See, e.g.*, *Severn* v. *Olive*, 3 Brod. & B. 71, 72–75 (1821).

These principles found their way into both federal and state law after the Founding.

2. From the earliest days of the Republic, federal courts could not shift the expenses of litigation to the losing party without clear statutory authorization. *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (per curiam). Congress must authorize courts to award particular expenses, including expert witness fees. *Hathaway* v. *Roach*, 11 F. Cas. 818, 820 (C.C.D. Mass. 1846) ("I am not aware that any courts" "[i]n this country" or "in England" have permitted fees to "experts and men of science" without a statute "prescrib[ing] [them] expressly").

a. The first Judiciary Act authorized cost taxation in the circuit courts (*e.g.*, *Hathaway*, 11 F. Cas. at 819), but with a caveat: If a prevailing plaintiff recovered less than $500 in actual damages, he was barred from recovering costs and could also "be adjudged to pay costs" to the other side. Act of 1789, ch. 20, § 20, 1 Stat. 73, 83. A plaintiff who prevailed and recovered more than $500 could shift his costs to the defendant.

Between 1799 and 1853, federal statutes generally did not specify *which* litigation expenses could be taxed or *in what amount*. *Alyeska Pipeline*, 421 U.S. at 248–49. During this period, federal courts looked to state law to determine the permissible scope and amounts of available costs. *Ibid.* Many state statutes,

and case law interpreting those statutes, delineated the scope and amounts of recoverable costs, and the federal courts borrowed that state law in determining the costs to tax in federal cases. *E.g.*, *Hathaway*, 11 F. Cas. at 820; *Ferrett* v. *Atwill*, 8 F. Cas. 1161, 1164 (C.C.S.D.N.Y. 1846).

State cost-shifting statutes during the 19th century frequently allowed "full costs," and they used that term as it had been used in England—to allow taxation of costs *only* in the mode of "party and party." During that period, the ordinary practice was for the state legislature to spell out which litigation expenses counted as "costs" and at what rates they could be recovered. *See*, *e.g.*, Revised Statutes of the State of Wisconsin, ch. 131, §§ 1–59 (1849); Revised Statutes of the State of Missouri, ch. 35, §§ 1–32 (1844–45); Revised Statutes of the State of Michigan, ch. 1, §§ 30–36; *id.* ch. 2, §§ 1–37 (1837); Revised Statutes of the Commonwealth of Massachusetts 1836, ch. 121, § 32; *id.* ch. 122, §§ 1–21 (1836).

The experience in 19th century New York is particularly instructive, given the preeminence of New York in publishing, printing, and entertainment during that period. *See* Eli M. Noam, *Media Ownership and Concentration in America* 144 (2009). The courts of New York served as the locus of much copyright litigation throughout the 19th century. *E.g.*, *Bullinger* v. *Mackey*, 4 F. Cas. 648, 649 (C.C.E.D.N.Y. 1877); *Blunt* v. *Patten*, 3 F. Cas. 763, 767 (C.C.S.D.N.Y. 1828).

New York's cost-shifting statute in 1830 provided for "full costs," defined as the "costs for services mentioned in this act, at and after the rate in this act before prescribed." Revised Statutes of New York, ch. X, tit. I, § 7.1 (1846–1848) (enacted in 1830); *see also id.*

§ 7.3. It was well-established that this statutory scheme shifted costs in the mode of "party and party," and strictly limited what costs could "be taxed against the unfortunate adversary." *Stevens & Cagger* v. *Adams*, 23 Wend. 57, 62 (N.Y. Sup. Ct. 1840). "Full costs" under the New York cost-shifting statute did *not* include expert witness fees, but rather permitted "fifty cents" for witness attendance and "four cents per mile going and returning," as well as "two dollars and fifty cents per day" for surveyors for their "actual service" in certain real estate cases. Revised Statutes of New York, ch. X, tit. III, §§ 49, 50.

Under New York practice, to receive "full costs" was simply to have the costs taxed *at the full amount* provided for in the relevant statute. *Rensselaer & Saratoga R.R.* v. *Davis*, 55 N.Y. 145, 149 (1873); *Linn* v. *Clow*, 1857 WL 6360 (N.Y. Sup. Ct. 1857). "Full costs" for the services listed in the statute, and at the listed rates, were in contrast to other cases where certain taxable costs were limited to "*two-thirds only of the amount prescribed for such purposes by this act*, together with other fees and disbursement allowed by law." Revised Statutes of New York, ch. X, tit. I, § 7.2 (emphasis added). Similarly, New York law provided for "double or treble costs" in other kinds of cases. *Id.* § 31 (emphasis added).

Other state statutes in the 19th century frequently used the phrase "full costs" as a means of ensuring that a party would (or could) recover all of its taxable costs despite otherwise applicable threshold requirements. Much like the $500 threshold in the first Judiciary Act, some states permitted recovery of costs only if the party secured a certain amount in damages. *E.g.*, Revised Statutes of New York, ch. X, tit. I, § 4; Revised Statutes of the State of Missouri, ch.

35, §§ 11–14; Revised Statutes of the Commonwealth of Massachusetts, ch. 121, §§ 2, 3. The phrase "full costs" was used to avoid that limit by providing that in particular cases "full costs shall be taxed for the party recovering *notwithstanding* judgment be under twenty dollars" or whatever other limitation applied. I Laws of the State of Maine, ch. LIX, § 30 (1821) (emphasis added); *see also* Revised Statutes of the Commonwealth of Commonwealth of Massachusetts, ch. 121, § 13 (the prevailing party in replevin "shall recover his full costs, without regard to the amount of damages, if any, recovered in the action").

b. The first Copyright Act did not explicitly authorize costs (*see* Act of May 31, 1790, ch. 15, 1 Stat. 124–26), and cost awards under that statute were made solely by reference to state law. *See In re Costs in Civil Cases*, 30 F. Cas. 1058, 1059 (C.C.S.D.N.Y. 1852) (explaining the practice); *Blunt*, 3 F. Cas. at 767 (awarding costs). In 1819, however, Congress gave original jurisdiction to the circuit courts over copyright cases. Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481. As a function of that statute and the first Judiciary Act, if a successful copyright plaintiff was unable to win at least $500 in damages, he could not recover *any* costs, and, in the court's discretion, could be made to pay the costs of the other side.

In 1831, Congress amended the Copyright Act to provide that "in all recoveries under [the copyright statute,] ... *full costs* shall be allowed thereon, any thing in any former act to the contrary notwithstanding." Act of Feb. 3, 1831, ch. 16, § 12, 4 Stat. 436, 438–39 (emphasis added). Congress subsequently explained that overriding the $500 threshold in the first Judiciary Act was the *express* purpose of the phrase "full costs" in this provision. H.R. Rep. No. 2222, 60th

Cong., 2d Sess. 19 (1909); *see also* H.R. Journal, 14th Cong., 2d Sess. 175 (1816) (commissioning inquiry into this issue). Accordingly, after 1831, copyright litigants could obtain "full costs," no matter the amount of their underlying recovery. But the *categories* and *amounts* of recoverable costs remained subject to the limitations established by state law. *See Ferrett*, 8 F. Cas. at 1164 (awarding costs in federal copyright case under 1831 Copyright Act by referencing New York state law as to each item taxed, permitting some items and disallowing others).

c. The reliance on state law to determine the amount of federal cost awards led to a patchwork of inconsistent results. State statutes differed widely in terms of which costs were recoverable and at what rates, meaning that while many litigants were taxed at modest, reasonable rates, some "losing litigants ... [were] unfairly saddled with exorbitant" cost awards. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565 (2012).

As a result, Congress in 1853 passed the Fee Act, aimed at eliminating "the flagrant abuses" fostered when "[o]ne system prevails in one district, and a totally different one in another." Cong. Globe App., 32d Cong., 2d Sess. app. 207 (1853) (statement of Sen. Bradbury). The Act adopted a "uniform rule" to stop the "exceedingly oppressive" size of cost awards, and to "simplify the taxation of [fees and costs], by prescribing a limited number of definite items to be allowed." *Ibid.*

By its terms, the Fee Act broadly provided "[t]hat in lieu of the compensation now allowed ... in the United States courts, to ... clerks ..., marshals, witnesses, jurors, commissioners, and printers, in the

several States, the following and no other compensation shall be taxed and allowed." Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 161. This Court has recognized that the Fee Act created a "uniform scale of fees for 'party and party' costs in the federal courts." *Sprague*, 307 U.S. at 165 n.2; *see also Alyeska*, 421 U.S. at 251–52 ("a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts").

"The sweeping reforms of the 1853 Act [were then] carried forward to today, 'without any apparent intent to change the controlling rules.'" *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987) (quoting *Alyeska*, 421 U.S. at 255). "Title 28 U.S.C. § 1920 now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party" (*ibid.*), while Section 1821 sets limits on the amounts of some of those cost categories. These two statutes "comprehensively regulate[]" costs "in the federal courts" (*ibid.*), and "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further." *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 86 (1991).

Section 1920 today sets out six discrete and exclusive categories of taxable costs:

- fees for the clerk and marshal;
- transcript fees;
- disbursements for printing and witnesses;
- fees for making copies;
- docketing fees; and
- the compensation of court-appointed experts and certain special interpretation services.

28 U.S.C. § 1920(1)–(6). Section 1821, in turn, delineates witness attendance rates ($40 per day), as well as per diem rules for witness travel expenses. *Id.* § 1821(a)–(f).

All other categories of fees and expenses (or amounts in excess of the fixed rates) are considered "non-taxable," meaning that—in the absence of explicit congressional command—they *cannot be shifted* and must be borne by the party who incurred them. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297–98, 301 (2006). As this Court explained at the time the Fee Act was adopted, "the legal taxed costs" in litigation across the country have always been "far below the real expenses incurred by the litigant." *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 372 (1851); *see also Taniguchi*, 566 U.S. at 573 ("taxable costs" are "limited" and "modest in scope").

d. In successive iterations of the Copyright Act, Congress has simply carried forward the "full costs" language from the 1831 enactment with no substantive change (*see, e.g.*, Act of 1870, ch. 230, § 108, 16 Stat. 198, 215), including through the major copyright law revisions in the Copyright Act of 1909 (Pub. L. No. 60-349, ch. 320, § 40, 35 Stat. 1075, 1084). Courts recognized that the "[f]ull costs" available under the 1909 Act remained the "ordinary costs" taxable in litigation. *Official Aviation Guide Co.* v. *Am. Aviation Assocs.*, 162 F.2d 541, 543 (7th Cir. 1947); *see also Balcaen* v. *Herschberger*, 415 F. Supp. 333, 334 (E.D. Wis. 1976) (party "entitled to recover his costs" under 1909 Act); *Goldman-Morgen, Inc.* v. *Dan Brechner & Co.*, 411 F. Supp. 382, 392 (S.D.N.Y. 1976) (awarding simply "costs" under 1909 Act); *Basevi* v. *Edward*

O'Toole Co., 26 F. Supp. 41, 50 (S.D.N.Y. 1939) (prevailing party was "entitled under the Copyright Act to full costs which includes *all taxable* disbursements" (emphasis added)); *Bullinger* v. *Mackey*, 4 F. Cas. 648, 649 (C.C.E.D.N.Y. 1877) (noting "the meagre costs allowed by the laws of the United States" in copyright action).

Congress undertook another major revision of the Copyright Act in 1976, adopting the substance of the statutory provision applicable today. As recodified, the cost-shifting provision now provides that district courts "may allow the recovery of full costs by or against any party other than the United States or an officer thereof," and may also "award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. Again, courts recognized that the statutory authorization to award costs remained limited to taxable costs. *See, e.g.*, *NLFC, Inc.* v. *Devcom Mid-Am., Inc.*, 916 F. Supp. 751, 762 (N.D. Ill. 1996) ("Caselaw interpreting ... the precursor of § 505, has never accorded courts more discretion because of the word 'full'"); *Stevens Linen Assocs., Inc.* v. *Mastercraft Corp.*, 1981 WL 1426, at *3 (S.D.N.Y. Feb. 17, 1981) (holding that 1976 Act's "full costs" were merely a recodification of 1909 Act's "full costs," and that such costs were limited "under 28 U.S.C. § 1920").

The two courts of appeals to initially consider the question presented in this case—*i.e.*, whether the Copyright Act authorizes courts to shift non-taxable expenses—concluded that "full costs" in 17 U.S.C. § 505 are limited to taxable costs under 28 U.S.C. §§ 1920 & 1821, and do not include (for example) expert witness fees. *Pinkham* v. *Camex, Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (per curiam); *Artisan Contractors Ass'n of*

Am., Inc. v. *Frontier Ins. Co.*, 275 F.3d 1038, 1040 (11th Cir. 2001) (per curiam). The Ninth Circuit subsequently "disagree[d]" with those decisions and ruled that non-taxable expenses may be shifted under the Copyright Act. *Twentieth Century Fox Film Corp.* v. *Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005).

3. Rimini engages "in lawful competition" with Oracle by, among other things, providing third-party support for various enterprise software programs, the related copyrights for which are owned by respondents. JA315. "[U]nlike the off-the-shelf consumer software used by individuals in everyday life, enterprise software employed by large organizations is customized around the organizations' specific needs." JA321–22. Thus, for instance, "[w]hile producers of consumer software generally design updates around standard use cases and make them available for end users to download and install directly, updates to enterprise software must be tested and modified to fit with bespoke customizations before being put to actual use." JA322. Much as one can take a car for service to the dealership or an independent auto mechanic, Oracle's licensees can shop around for aftermarket support, and sometimes they choose Rimini.

a. In 2010, respondents filed suit against petitioners, attempting to squelch the new competition in the market for support services. Respondents alleged numerous causes of action, including copyright infringement. JA316. On that claim, petitioners defended themselves principally on the basis that Oracle's customers' license agreements permit third-party support, a point which respondents have always begrudgingly conceded. Petitioners' position was that its various support practices were based on reasonable interpretations of the license agreements, while

respondents contended that Rimini's activities were outside the scope of the license agreements and thus constituted infringement.

The jury found Rimini, but not Ravin, liable for "innocent[ly]" infringing respondents' copyrights. JA262, JA266, JA316. (The jury exonerated Ravin under the Copyright Act.) As the jury instructions stated, "innocent infringement" meant that Rimini "was not aware that its acts constituted infringement" *and* that it further "had *no reason to believe* that its acts constituted ... infringement." JA255–56 (emphasis added). The jury awarded hypothetical license damages of $35.6 million under the Copyright Act. JA338 & n.7.

b. After trial, respondents moved for an "extensive permanent injunction" (JA316), for approximately $35 million in attorneys' fees (JA294), more than $20 million in costs (JA294), and over $22 million in prejudgment interest (JA309, JA338).

Respondents sought $4.9 million in taxable costs for items that fell within the purview of 28 U.S.C. §§ 1920 & 1821. JA273. The district court awarded all of those costs. JA306–07. Respondents *also* requested $7,820,091.36 in "Expert Fees," $314,838.09 in "Consultant Fees," $8,271,552.59 in "Electronic Discovery Costs," and $1,230,273.64 in "Other Non-Taxable Costs," for a total of $17,636,755.68 in what they called "Non-Taxable Costs." JA273–74. The district court reduced the fees for one of the experts and also applied an across-the-board reduction of 25% because respondents did not properly document some of the claimed expenses, resulting in a total award of "$12,774,550.26" for what the court called "non-taxable costs." JA306.

Petitioners objected to the award of non-taxable expenses, arguing that any award under the Copyright Act should be limited to taxable costs permitted by 28 U.S.C. §§ 1920 & 1821. *See* C.A. App. 180. The district court, however, relied on the Ninth Circuit's decision in *Twentieth Century Fox* to rule that the Copyright Act "permits a successful plaintiff to recover *all costs* incurred in litigation, not just taxable costs authorized by ... 28 U.S.C. § 1920." JA305 (emphasis added).

c. On appeal, the Ninth Circuit "narrow[ly]" affirmed the copyright infringement verdict (JA332 n.6), and vacated the permanent injunction and fee award, remanding to the district court to reconsider these awards "in light of [respondents'] more limited success at litigation." JA343. The court also ordered a reduction in the taxable cost award (from $4.9 million to $3.4 million, because the district court made a mathematical error in calculating the taxable costs), and affirmed the award of prejudgment interest on the copyright damages. JA343, JA345–46.

But the Ninth Circuit declined to disturb the award of "$12,774,550.26 in non-taxable costs," relying on its previous decision in *Twentieth Century Fox*, which "held that, because 17 U.S.C. § 505 permits the award of *full* costs, the award of costs under § 505 is not limited to the categories of costs described in 28 U.S.C. § 1920." JA345. In response to petitioners' submission that *Twentieth Century Fox* cannot be reconciled with this Court's case law, the panel held: "[w]e are bound by our precedent." JA346.

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred by affirming an award of $12.8 million in expert witness fees, jury consulting fees, e-discovery expenses, and other non-taxable expenses of litigation, because Congress did not authorize the shifting of such expenses under the Copyright Act, 17 U.S.C. § 505. That part of the judgment below should therefore be reversed.

I. When Congress authorizes an award of "costs," as it did in 17 U.S.C. § 505, courts are permitted to award only the discrete litigation expenditures listed in 28 U.S.C. §§ 1920 & 1821—*i.e.*, "taxable" costs. Congress uses other words (such as "fees" and "expenses") to authorize expert witness fees and other non-taxable expenses.

A. The statutory text and structure, this Court's precedents on cost-shifting, and the history of "full costs" provisions all demonstrate that 17 U.S.C. § 505 is limited to taxable costs under Sections 1920 and 1821.

1. There are just two words at issue here—"full" and "costs." 17 U.S.C. § 505. "Full" denotes that the limits of something have been reached (a "full deck of cards"). The real question concerns "costs." The meaning of that word is well-established in the tripartite taxonomy of "costs," "fees," and "expenses": "Costs" is a reference to the limited litigation expenditures covered by Sections 1920 and 1821 as taxable costs and does not include, for instance, expert witness fees or other unenumerated expenses. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012).

2. The Copyright Act reflects this traditional taxonomy by providing first for "full costs" and later for an "attorney's fee." 17 U.S.C. § 505. Section 505 does

not permit the shifting of expert witness fees, jury consulting fees, or other non-taxable expenses. Otherwise, there would have been no point in Congress separately providing for attorneys' fees, as they would already be encompassed in "full costs."

3. In an important trilogy of decisions—*Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), and *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006)—this Court established a clear rule under which "*no statute* will be construed as authorizing the taxation of" litigation expenses outside the scope of Sections 1920 and 1821 "unless the statute refer[s] *explicitly*" to those categories of expenses. *Murphy*, 548 U.S. at 301 (emphases added). These cases also recognize that "costs" is a term of art in federal law, and means (absent express contrary command) the categories of taxable costs enumerated in Sections 1920 and 1821.

4. The Eighth and Eleventh Circuits properly applied the *Crawford Fitting* rule to hold that nothing about the words "full costs" makes explicit reference to expert witness fees. *Pinkham* v. *Camex, Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (per curiam); *Artisan Contractors Ass'n of Am., Inc.* v. *Frontier Ins. Co.*, 275 F.3d 1038, 1040 (11th Cir. 2001) (per curiam). The Ninth Circuit, in contrast, held that "full costs" amounts to an explicit statement by Congress, authorizing the shifting of all costs, fees, and expenses in litigation. *Twentieth Century Fox Film Corp.* v. *Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005). The Ninth Circuit's reasoning—that this construction is necessary to avoid rendering the word "full" superfluous—is errant. It ignores that "full" is an adjective modifying the operative term of art "costs," and that "full" is

not superfluous because it constrains district court discretion regarding the *amount* of taxable costs that can be awarded.

B. The conclusion that "full costs" are limited to taxable costs under 28 U.S.C. §§ 1920 & 1821 is inescapable in light of the history of that phrase in cost-shifting statutes.

1. The phrase "full costs" came from England, where it had a centuries-long meaning as ordinary taxable costs, excluding any award of expert witness fees. John Gray, *A Treatise on the Law of Costs in Actions & Other Proceedings in the Courts of Common Law at Westminster* 502 (1853). As Baron Pollack observed, "the terms 'full costs' and 'costs' mean the same thing." *Jamieson* v. *Trevelyan*, 24 Law Tim. Rep. 222, 223 (1855).

2. State statutory law and practice in America is consistent with that history. The word "full" in "full costs" referred to the *amount* of the listed, taxable costs (*i.e.*, whether the party would recover at the full statutory rate or something less). *E.g.*, Revised Statutes of New York, ch. X, tit. I, § 7.1 (1846–1848) (enacted in 1830). Federal courts followed state-law practice in awarding costs until 1853.

3. The Fee Act of 1853 displaced the state-law-dependent regime in favor of a uniform, exhaustive federal regime. Courts afterward, under the "full costs" provision of the 1870 and 1909 Copyright Acts, viewed them as simply taxable costs. The 1976 Act made costs discretionary, but did not otherwise change the meaning of "full costs."

4. What statutory and legislative history exists demonstrates that the phrase "full costs" was inserted into the Copyright Act of 1831 (and carried forward)

to overturn a limitation in federal law that barred circuit court litigants who recovered less than $500 in damages from receiving any costs. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 19 (1909). Nothing in this history indicates any intent to shift non-taxable fees and expenses through the words "full costs."

II. The textual, structural, precedential, and historical arguments are sufficient bases for reversing the decision below. To the extent policy considerations are even relevant, they cut sharply against the Ninth Circuit's position.

1. The *Crawford Fitting* rule advances the separation of powers by requiring Congress to express its policy decisions. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). Moreover, because costs were not allowed at common law, cost-shifting is not a power the federal courts possess absent statutory authorization. This Court has made clear with respect to the Copyright Act in particular that it will not deviate from the American Rule without an explicit statutory command instructing it to do so. *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

2. Adopting the Ninth Circuit's approach would inexplicably treat copyright cost recovery differently from federal patent and trademark cost recovery, both of which are limited by 28 U.S.C. §§ 1920 & 1821. These intellectual property laws should be interpreted in parallel. *E.g.*, *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).

3. Shifting all fees and expenses to the losing party in copyright cases would not be an "administrable" rule, in no small part because it would violate this Court's "oft-stated concern that an application for"

costs and fees "should not result in a second major litigation." *Kirtsaeng* v. *John Wiley & Sons*, Inc., 136 S. Ct. 1979, 1987 (2016). "[T]he assessment of costs" should be "merely a clerical matter that can be done by the court clerk." *Taniguchi*, 566 U.S. at 573. But under respondents' view, the assessment of "full costs" will take on a life of its own, as it already has in the Ninth Circuit and as this case demonstrates.

4. Because respondents are unable to defend the decision below on the merits, they may again try to distract the Court with *ad hominem* attacks against petitioners. *See* Br. in Opp. 22–24. This narrative is factually false, contrary to the jury verdict and the court of appeals' ruling, and legally irrelevant—either Congress authorized the shifting of all costs, fees, and expenses under Section 505 or it did not. Respondents' misplaced emphasis on district court "discretion" underscores that they are advocating for exactly what Congress tried to *stop* in 1853—"great diversity in practice among [the federal district] courts." *Taniguchi*, 566 U.S. at 565. Rejecting respondents' view would enhance national uniformity both in copyright litigation and in federal cost-shifting law.

For all of these reasons, the judgment of the court of appeals should be reversed insofar as it affirmed the award of $12.8 million in non-taxable expenses to respondents.

ARGUMENT

As this Court has repeatedly recognized, Congress consistently uses three different terms to refer to the amounts spent by one party in litigation that, depending on the statute at issue, might be shifted to its adversary at the end of the case:

- "*Costs*" means the "taxable" costs enumerated in 28 U.S.C. § 1920 (transcripts, copies, docketing charges, etc.) and quantified in 28 U.S.C. § 1821;
- "*Fees*" means the amounts charged by professional service providers, such as attorneys, expert witnesses, and consultants; and
- "*Expenses*" means expenditures other than costs and fees, such as electronic discovery matters.

E.g., *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297–98 (2006). Applying this tripartite taxonomy here requires reversal.

The Copyright Act authorizes the award of "full costs." 17 U.S.C. § 505. The *noun* chosen by Congress is "costs," which means taxable costs as set forth in 28 U.S.C. §§ 1920 & 1821. The *adjective* Congress used to modify costs is "full," which means the entire amount of those taxable costs. The question of statutory construction presented here is no more complicated than that. Respondents were entitled to (and have already been paid) the entirety of their $3.4 million in taxable costs. They were not entitled to (and must, therefore, refund) the $12.8 million in non-taxable fees and expenses that the district court also awarded. Accordingly, the Ninth Circuit's affirmance of that award should be reversed.

I. The Copyright Act's Authorization For "Full Costs" Is Limited To Taxable Costs.

Congress knows how to shift costs, and it knows how to shift attorneys' fees and expert witness fees, and it knows how to shift other expenses. Whenever Congress wants to make one party pay the other party's fees or other expenses in litigation, it says so by explicitly authorizing the courts to award "fees" or "expenses." But when Congress wants to authorize only the discrete categories of taxable costs under 28 U.S.C. §§ 1920 & 1821, it says, as it did in the Copyright Act, "costs." The additional word "full" modifies the amount of such costs; it does not expand the categories of expenditures that are recoverable. Indeed, there is a centuries-long tradition both in England and America interpreting "full costs" in just such a manner. The statutory text and structure, in light of that history, compel reversal.

A. The Statutory Text and Structure Establish That "Full Costs" Means Taxable Costs.

1. This Court "always turn[s] first" to "the words of [the] statute," because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Thus, this Court will "enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). Here, "the plain text of" the Copyright Act "supplies a ready answer" to the question presented. *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1354 (2018).

The first sentence of Section 505 authorizes district courts to award "full costs." 17 U.S.C. § 505. The

Court has just two words to interpret—"full" and "costs."

"Full," in its adjectival form, means either having all that can be contained (a "full tank of gas") or complete (a "full set of teeth"). *See, e.g.*, *The Compact Oxford English Dictionary* 642 (2d ed. 1994); *Webster's Second New International Dictionary* 1017 (1943); Noah Webster, *An American Dictionary of the English Language* 39 (1828). It is a term of quantity or amount, generally denoting that the limits of whatever is being modified have been reached ("full throttle," "full load," "full strength," etc.). A "full deck" of standard playing cards contains 52 cards, no more and no fewer.

The real question is what "costs" means, for that is the noun that "full" is modifying in the Copyright Act. As the Court explained only a few years ago, "[a]lthough 'costs' has an everyday meaning synonymous with 'expenses,'" the term "costs" in federal cost-shifting statutes "is more limited," representing only "a fraction of the nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators." *Taniguchi*, 566 U.S. at 573. In federal cost- and fee-shifting statutes, the word "costs" means *taxable* costs, as defined in 28 U.S.C. §§ 1920 & 1821. When Congress wants to authorize awards of additional expenditures, it uses the words "fees" or "expenses" to make clear the departure from taxable costs.

Thus, to resolve the question presented in this case, the Court need look no further than the tripartite taxonomy it has *already* established in a line of precedents construing the three "related" but nonetheless "distinguished" terms used throughout federal statutory law—"costs, fees, and expenses." 10 Charles

Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2665 (3d ed. April 2018).

First, "costs" refers to a "limited" set of expenses that courts are permitted to shift at the end of litigation, and they are spelled out in statutes. 10 Wright & Miller, *supra* § 2666. These "legal taxed costs" are "far below the real expenses incurred by the litigant" (*Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 372 (1851)), and have long been understood to exclude the majority of expenses a party may actually incur. Indeed, as this Court has already held, 28 U.S.C. § 1920 "defines the term 'costs'" for purposes of federal law. *Crawford Fitting*, 482 U.S. at 441. Thus, whatever Congress lists in Section 1920 are costs. They are called "taxable" costs because they are "tax[ed]" based on the cost bill. *See* 28 U.S.C. § 1920 ("A judge or clerk of any court of the United States may *tax* as costs the following ...." (emphasis added)). Anything *beyond* those items (or in excess of amounts governed by Section 1821) are *not* costs unless Congress expressly says so.

Second, "fees" refers to money paid to another person or entity for professional services. Most prominent are two separate categories of fees common in litigation, "attorneys' fees" and "expert witness fees," which this Court has observed have *long* been treated (both in statute and judicial usage) "as separate categories of expense" both from one another and from "costs." *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 93 (1991). As particularly pertinent here, the word "costs" in federal law "does not include expert fees." *Murphy*, 548 U.S. at 297.

Third, those things which are not "costs" or "fees" are "expenses." *Murphy*, 548 U.S. at 297. While this case does not require the Court to determine what

might be recoverable under a statute that (unlike the Copyright Act) expressly authorizes the shifting of expenses, the term presumably includes items such as the electronic discovery expenditures included in the award in this case.

Congress has long distinguished "costs," "fees," and "expenses" throughout the United States Code—and sharply so. *Casey*, 499 U.S. at 89 & n.4 (noting some 34 statutes). If Congress intends for a party to receive costs, it will say "costs." If Congress wants a party to receive costs and attorneys' fees, it will say so. If Congress wants to include expert witness fees, it will so indicate. Congress has made itself perfectly clear in this respect, in almost endless permutations—as numerous exemplary statutes illustrate.[1]

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[1] *E.g.*, 5 U.S.C. § 504(b)(1)(A) ("fees and other expenses," including "expenses of expert witness" and "attorney or agent fees"); *id.* § 504(f) ("costs, fees, or other expenses"); 10 U.S.C. § 2409(c)(1) ("all costs and expenses (including attorneys' fees and expert witnesses' fees)"); 11 U.S.C. § 363(n) ("any costs, attorneys' fees, or expenses incurred"); 12 U.S.C. § 1464(d)(1)(B)(vii) ("reasonable expenses and attorneys' fees"); 12 U.S.C. § 1786(p) ("reasonable expenses and attorneys' fees"); 15 U.S.C. § 77z-1(a)(6) ("attorneys' fees and expenses"); *id.* § 1117(a) ("costs of the action" and "attorney fees"); *id.* § 2310(d)(2) ("cost and expenses" "including attorneys' fees"); *id.* § 2618(d) ("costs of suit and reasonable fees for attorneys and expert witnesses"); *id.* § 2619(c)(2) ("costs of suit and reasonable fees for attorneys and expert witnesses"); *id.* § 2805(d)(1)(C) ("reasonable attorney and expert witness fees"); 28 U.S.C. § 1447(c) ("just costs and any actual expenses, including attorney fees"); *id.* § 2412(d)(2)(A) ("fees and other expenses," including "reasonable expenses of expert witnesses"); 29 U.S.C. § 1132(g)(1) ("attorney's fee and costs of action"); *id.* § 1370(e)(1) ("costs and expenses incurred in connection with such action, including reasonable attorney's fees"); 30 U.S.C. § 938(c) ("all costs and expenses (including the attorney's fees)"); 33 U.S.C.

In short, the words "costs," "fees," and "expenses" are terms of art in a foundational statutory architecture. This regime comprehensively governs the shifting of litigation expenditures in federal court. *Murphy*, 548 U.S. at 297 ("'costs' is a term of art"). Absent some clear indicium of contrary congressional command, the word "costs" in the Copyright Act must be given the same meaning (*i.e.*, "taxable costs") as it has in every other federal cost- and fee-shifting provision. *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1646 (2016).

2. The cost- and fee-shifting provision of the Copyright Act fits perfectly within the traditional taxonomy. That provision reads, in its entirety:

> In any civil action under this title, the court in its discretion may allow the recovery of *full costs* by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable *attorney's fee* to the prevailing party *as part of the costs*.

17 U.S.C. § 505 (emphases added).

The reference to "costs" in the first sentence of Section 505 "is obviously [to] the list set out in 28 U.S.C. § 1920." *Murphy*, 548 U.S. at 297–98. The second sentence of Section 505 "simply adds reasonable attorney's fees incurred by [the] prevailing [party] to the list of costs that prevailing [parties] are otherwise entitled to recover." *Id.* at 297. Absent from the authorized amounts are "expert fees," "consultant fees,"

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§ 1367(c) ("all costs and expenses (including the attorney's fees)"); 42 U.S.C. § 247d-6d(e)(9) ("reasonable expenses ... including a reasonable attorney's fee"); *id.* § 1988(b), (c) ("attorney's fees as part of the costs" and "expert fees").

and other expenses of litigation that the district court awarded to respondents here. JA306–07. Section 505 does not authorize them. As a matter of fact, the very day Congress enacted the current version of Section 505, it enacted *numerous* other statutes expressly shifting expert witness fees, but omitted any such provision from the Copyright Act. *Compare Casey*, 499 U.S. at 87–88, *with* Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988), *and id.* § 101, 90 Stat. 2586 (codified at 17 U.S.C. § 505).

In *Twentieth Century Fox Film Corp.* v. *Entertainment Distributing*, 429 F.3d 869 (9th Cir. 2005), the Ninth Circuit ignored the well-established taxonomy of "costs," "fees," and "expenses" and adopted instead the self-contradictory phrase "non-taxable costs." *Id.* at 884–85. The Ninth Circuit held "that district courts may award otherwise non-taxable costs, including those that lie outside the scope of [28 U.S.C.] § 1920, under [17 U.S.C.] § 505." *Id.* at 885. The court of appeals in *this* case then doubled-down on that holding, concluding that expert witness fees, and indeed *any* litigation expenses, are recoverable under the Copyright Act. JA345–46; *see also* JA305.

The Ninth Circuit's myopic focus on "full costs" cannot be reconciled with the structure of 17 U.S.C. § 505. That provision comprises two sentences—one providing for "full costs" and the *next* providing for attorneys' fees as part of those costs. If, as respondents have posited, "full costs" means all "familiar expenses associated with litigation—investigative fees, fees for party-retained experts, and so on" (Br. in Opp. 13)—then Congress's separate provision for attorneys' fees in Section 505 was entirely pointless. Attorneys' fees would already be included in the Ninth Circuit's expansive definition of "full costs," and thus the position

adopted in *Twentieth Century Fox* renders the entire second sentence of Section 505—*i.e.*, "[e]xcept as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs"—"superfluous." *Crawford Fitting*, 482 U.S. at 441. It also draws into question the *numerous* other occasions in which Congress has authorized "*all* costs *and expenses* ... *including attorney's fees.*" *E.g.*, 30 U.S.C. § 938(c) (emphases added).

The "statutory usage shows beyond question" that costs, attorneys' fees, "and expert fees are distinct items of expense," yet "[i]f, as [respondents] argue[], the one includes the other, dozens of statutes referring to [them] separately become an inexplicable exercise in redundancy." *Casey*, 499 U.S. at 92; *see also Murphy*, 548 U.S. at 306–07 (Ginsburg, J., concurring) ("Congress did not compose § 1415(i)(3)(B)'s text, as it did the texts of other statutes too numerous and varied to ignore, to alter the common import of the terms 'attorneys' fees' and 'costs' in the context of expense-allocation legislation"). Congress's separate specification of attorneys' fees in 17 U.S.C. § 505 confirms that "costs" in that same provision means "costs."

"The use of this term of art ['costs'], rather than a term such as 'expenses,' strongly suggests that [Section 505] was not meant to be an open-ended provision" shifting "all expenses incurred by prevailing [parties] in connection with a [Copyright Act] case." *Murphy*, 548 U.S. at 297. When Congress wanted to shift other expenses, it knew well how to do so. *See, e.g.*, 30 U.S.C. § 938(c) (shifting "all costs and expenses (including the attorney's fees)"); 33 U.S.C. § 1367(c) (shifting "all costs and expenses (including the attorney's fees)"); 42 U.S.C. § 1988(b), (c) (shifting "attorney's fees as part of the costs" and separately

"expert fees"). In neither *Twentieth Century Fox* nor the decision below did the Ninth Circuit grapple with this structural defect in its construction.

3. In an important trilogy of cases, this Court has articulated a clear rule under which "*no statute* will be construed as authorizing the taxation of" litigation expenses outside the scope of Sections 1920 and 1821 "unless the statute refers explicitly" to those categories of expenses. *Murphy*, 548 U.S. at 301 (emphasis added). That is because "28 U.S.C. § 1920 now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting*, 482 U.S. at 440. This statute, along with Section 1821, "comprehensively regulate[s]" costs "in the federal courts" (*ibid.*), and "define[s] *the full extent* of a federal court's power to shift litigation costs *absent express statutory authority to go further*." *Casey*, 499 U.S. at 86 (emphases added).

These three binding precedents—*Crawford Fitting*, *Casey*, and *Murphy*—require reversal here.

In *Crawford Fitting*, the prevailing parties had submitted a bill of costs seeking tens of thousands of dollars of expert witness fees on the theory that Federal Rule of Civil Procedure 54(d) "granted [the district court] discretion to exceed the $30-per-day witness fee limit found in 28 U.S.C. § 1821(b)." 482 U.S. at 439. This Court rejected that argument, holding that when "a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound" by the limitations of Sections 1920 and 1821. *Ibid.* After recounting the history of Congress's "comprehensive[] regulat[ion] [of] fees and the taxation of fees as costs in the federal courts," this Court laid down a simple and clear rule: Unless there is

"plain evidence of congressional intent to supersede [Sections 1920 and 1821]," in the form of an "explicit statutory authorization," a court may not assess non-taxable expenditures, such as expert witness fees, against a losing party. *Id.* at 440, 445; *see also id.* at 445 ("We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920"). Rule 54(d) provided no such authority, as it simply provided that a district court could tax costs unless some other law forbade it from doing so. *Id.* at 441–42. This Court held that Rule 54(d) was an independent authorization to tax the costs *defined* by Sections 1920 and 1821. *Ibid.*

The Court then reiterated and applied this rule in *Casey*, where it considered "whether the term 'attorney's fee' in [42 U.S.C. § 1988] provides the 'explicit statutory authority' required by *Crawford Fitting*" to shift expert witness fees, or alternatively, whether such fees might be considered "part of the 'costs' allowed by § 1988." 499 U.S. at 87 & n.3. The answer to both questions was a resounding *no*. This Court observed that Sections 1920 and 1821 "define *the full extent* of a federal court's power to shift litigation costs absent *express statutory authority to go further*." *Id.* at 86 (emphases added). Section 1988 did not contain any provision "referring explicitly" to categories of costs beyond Sections 1920 and 1821, unlike numerous statutes enacted "[i]n 1976, just over a week prior" to the version of Section 1988 in force at the time. *Id.* at 87–88. Those statutes, unlike Section 1988, expressly shifted expert fees. *Id.* at 88. The Court took this as powerful evidence that Congress knew how to provide for expense categories beyond those in Section

1920 when it wanted to, thus rejecting the party's argument that it could recover these non-taxable expenses. *Ibid.*

Murphy followed. That case concerned whether the Individuals with Disabilities Education Act permitted the recovery of expert fees in providing that a court "may award reasonable attorneys' fees as part of the costs" to prevailing parents. 548 U.S. at 293–94. The prevailing parents sought to recover thousands of dollars they had spent retaining an expert in the litigation. *Id.* at 294. The *Murphy* Court rejected that request, even though the legislative history of the pertinent statute suggested that expert fees might be recoverable. *See id.* at 302–03. The Court emphasized that under "*Crawford Fitting*[,] *no statute* will be construed as authorizing the taxation of witness fees as costs unless the statute refers explicitly to witness fees." 548 U.S. at 301 (emphasis added). "'[C]osts' is a term of art" that "obviously" refers to "the list set out in 28 U.S.C. § 1920" and "§ 1821," both of which govern "the taxation of costs in federal court" and "strictly limit[]" recoveries of expenses such as witness fees. *Id.* at 297–98.

Respondents have previously suggested that *Murphy* "is off-point," because it concerned whether the phrase "attorneys' fees" encompassed "expert witness fees," but "did not even mention the phrase 'full costs'" as the Copyright Act does. Br. in Opp. 19. But the Court did squarely address the meaning of the word "costs" in *Murphy*, holding that it did not authorize expert fees. 548 U.S. at 297–98. Indeed, Solicitor General Clement addressed this very argument in his brief, contending that "the term 'costs' *cannot reasonably be construed to include 'expert fees'*" because

"[t]he costs that can be taxed in the federal court system are statutorily *defined* in 28 U.S.C. 1920 and do not include general expert fees." Br. for United States as *Amicus Curiae* 6, No. 05-18 (Feb. 21, 2006) (emphases added). This conclusion, the government explained, was "compelled" by *Crawford Fitting* and *Casey*. *Ibid.* So, too, here.

The rule announced in the *Crawford Fitting* line of cases applies to *all* federal cost- and fee-shifting statutes. *See Murphy*, 548 U.S. at 301 ("*no statute*" to be interpreted as shifting expenses outside Section 1920 unless it explicitly says so (emphasis added)). It is therefore no answer to say that none of these cases involved the Copyright Act. As this Court just recently reiterated, "[i]t has been the Court's approach to interpret" terms in cost- and fee-shifting statutes "in a consistent manner." *CRST*, 136 S. Ct. at 1646; *see also Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 537 (1994) (Thomas, J., concurring in the judgment); *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); *Indep. Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758, n.2 (1989); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 691 (1983); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433, n.7 (1983); *Northcross* v. *Board of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (*per curiam*). Respondents' suggestion that the Copyright Act is unique simply "ignores [the Court's] longstanding practice of construing statutes *in pari materia*," as well as the extensive body of statutes separately describing costs, fees, and expenses. *Crawford Fitting*, 482 U.S. at 445.

The controlling trilogy establishes that if a party seeks an item of litigation expense not encompassed by Sections 1920 and 1821, there must be a clear, explicit statutory command to shift that expense. And

Section 505 provides a perfect example of what such a command looks like *with respect to attorneys' fees*. The first sentence of Section 505 simply shifts "full costs." The second sentence then clearly authorizes the district court to *also* shift a reasonable attorneys' fee, as a part of the "costs" available under Section 1920. 17 U.S.C. § 505. Shifting expert witness fees and other non-taxable expenses requires a similarly clear provision, as Congress has explicitly done in literally *dozens* of other statutes. *See* note 1, *supra*; *Casey*, 499 U.S. at 89 & n.4. Because the Copyright Act contains no such provision, the court of appeals erred in affirming the award of non-taxable expenses.

4. The "full costs" authorized by 17 U.S.C. § 505 either are limited by 28 U.S.C. §§ 1920 & 1821 or they are not. There is no middle ground. And the courts of appeals have divided on how to answer the question. One line of authority faithfully applies the *Crawford Fitting* rule. The Ninth Circuit, in contrast, allows litigation expenses to be awarded willy-nilly in copyright cases.

The Eighth and Eleventh Circuits recognized that this Court has required express statutory authority to award expert witness fees or other non-taxable expenses. *Pinkham* v. *Camex, Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (per curiam); *Artisan Contractors Ass'n of Am., Inc.* v. *Frontier Ins. Co.*, 275 F.3d 1038, 1040 (11th Cir. 2001) (per curiam). And both courts squarely held that the Copyright Act does not authorize the award of litigation expenses beyond those enumerated in 28 U.S.C. §§ 1920 & 1821, including particularly expert witness fees. Those holdings followed directly from this Court's precedents:

> We do not agree that the 'full costs' language 'clearly,' 'explicitly,' or 'plainly' evidences congressional intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other statutes. Thus, *we conclude costs under 17 U.S.C. § 505 are limited to the costs expressly identified in 28 U.S.C. § 1920*, and that expert witness fees in excess of the 28 U.S.C. § 1821(b) $40 limit are not recoverable.

Pinkham, 84 F.3d at 295 (emphasis added); *see also Artisan Contractors*, 275 F.3d at 1040 ("Section 505 makes no clear reference to witness fees, nor otherwise evinces a clear congressional intent to supercede [sic] the limitations imposed by § 1821").

The Ninth Circuit, however, expressly disagreed with the Eighth and Eleventh Circuits, holding in *Twentieth Century Fox* that the Copyright Act authorizes the award of expert witness fees and other non-taxable expenses:

> *Crawford Fitting* instructs us to carefully inspect § 505 for clear evidence of congressional intent that non-taxable costs should be available. We respectfully disagree with those circuits who have concluded differently, but we think that there can be no other import to the phrase 'full costs' within § 505. Construing § 505 as limiting the costs that may be awarded to any particular subset of taxable costs effectively reads the word 'full' out of the statute. We must give every word in a statute meaning.... *Thus, we hold that district courts may award otherwise non-taxable costs, including those that lie outside the scope of § 1920, under § 505.*

429 F.3d at 885 (emphasis added). In the decision below, the Ninth Circuit followed *Twentieth Century Fox* as circuit precedent. JA346.

The Ninth Circuit's approach does not withstand even minimal scrutiny. In the first place, by bending over backwards to avoid making one word ("full") superfluous, the Ninth Circuit rendered superfluous the entire second sentence of Section 505. *See* Part I.A.2., *supra*. That is not an acceptable application of the canon against superfluity.

Moreover, in focusing exclusively on the word "full," the Ninth Circuit failed to recognize that the operative statutory term is "costs"—a noun that has a well-recognized meaning in federal law. The adjective "full"—today, as in 1831—is dependent on the character of the noun it modifies, and describes the amount or extent of *that thing*, not *something else*. *See Webster's Second New International*, *supra*, at 1017. A "full tank" can hold no more gasoline, but says nothing about the radiator fluid or crankcase oil in the same vehicle. A "full deck" has 52 cards, but says nothing about the number of poker chips or markers held by the players. Similarly "full costs" means all the *costs* to which the litigant is entitled, but says nothing about the *fees* or *expenses* that might also have been incurred. The meaning of "full *costs*" cannot be divorced from the word "costs," which, as previously demonstrated, has a uniform meaning across federal law and refers to 28 U.S.C. §§ 1920 & 1821. Yet that is precisely what the Ninth Circuit did in *Twentieth Century Fox*.

Contrary to the Ninth Circuit's unexamined supposition, the adjective "full" is not superfluous under the traditional taxonomy. Even setting aside the historical pedigree of the phrase "full costs" (*see* Part I.B.,

infra), 17 U.S.C. § 505 on its face ensures that district courts award the full rates set forth in Section 1821 for each enumerated category of costs in Section 1920, rather than some lesser amount. While district courts since 1976 have had discretion whether to award costs *at all* (*see Fogerty*, 510 U.S. at 524 n.11), they have no discretion to award less than the amounts specified in Section 1821 for each of the categories in Section 1920 (because anything less would not be "full costs"). Consistent with this plain and ordinary meaning of "full costs," the district court here awarded all of the taxable costs respondents sought at the full statutory rates. JA305.[2]

At bottom, the Ninth Circuit paid only lip service to the *Crawford Fitting* rule, which requires an *explicit* statutory directive to authorize district courts to go beyond the taxable costs specified in 28 U.S.C. §§ 1920 & 1821. While the Ninth Circuit read a single adjective—"full"—as expressing the requisite legislative intent, this Court's cases make clear that more is required: To authorize an award of expert witness fees, for example, Congress must actually refer to expert witness fees. *Murphy*, 548 U.S. at 301; *Crawford Fitting*, 482 U.S. at 445. The Copyright Act manifestly does not do so. Therefore the district court erred in awarding such fees (and other non-taxable expenses) to respondents, and the Ninth Circuit erred in adhering to its own flawed precedent in affirming that award. Reversal is warranted.

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[2] To the extent "full costs" might contain an inherent redundancy, that is true of many adjectives ("genuine leather," "whole milk") including other adjectival uses of "full" ("a full pound," "full circle"). "The canon against surplusage is not an absolute rule." *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 385 (2013).

B. Historical Practice Confirms That "Full Costs" Means Taxable Costs.

The arguments above are sufficient to conclude that "full costs" in 17 U.S.C. § 505 means the "full *costs*" enumerated in 28 U.S.C. § 1920 and quantified by § 1821. This conclusion becomes inescapable in light of the history surrounding the phrase "full costs" through English and American legal history.

1. The phrase "full costs" appeared in numerous statutes in England throughout the 17th, 18th, and 19th centuries. Importantly, the very first copyright statute, the Statute of Anne, provided that a prevailing defendant "shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath." 8 Anne c. 19, § 8 (1710). This same language was carried forward into the Copyright Act of 1842 in England. *See* 5 & 6 Vict., ch. 45, § 26. The phrase "full costs" was understood to bear a *narrower* meaning than statutes that provided for "full cost *and expenses*" of the proceeding. Lands Clause Consolidation Act of 1845, 8 & 9 Vict., ch. 18, § 126 (emphasis added); *see also* 11 Geo. 2, ch. 19, § 9 (1736) (providing for "full costs *and charges of making [a] distress*" (emphasis added)); 12 & 13 Vict. ch. 106 (1849) ("all costs, *charges, and expenses*" (emphasis added)).

English courts explained that "no distinction is known in the law between costs and full costs" under cost-shifting statutes. *Irwine* v. *Reddish*, 5 B. & Ald. 796 (1822) (construing 11 Geo. 2, ch. 19, § 19). For example, *Jamieson* v. *Trevelyan*, 24 Law Tim. Rep. 222 (1855), interpreted "full Costs of Suite" (17 Car. II, ch. 7, §§ 1–3 (1665)) in replevin. Invoking the canon against surplusage, the prevailing party argued that "[e]ffect must be given to the word 'full,'" *i.e.*, that

it *must* mean "something more than costs of the ordinary kind." 24 Law Tim. Rep. at 223. The party was seeking his full expenses of suit. *Id.* at 222–23. But the court rejected this argument outright because "*the terms 'full costs' and 'costs' mean the same thing.*" *Id.* at 223 (Pollack, C.B.) (emphasis added); *see also ibid.* (Parke, B.) ("The term in the statute ... 'full costs' means nothing more than ordinary costs").

Later still, the English courts applied this same meaning to the "Copyright Act of 1842['s]" provision for "full costs"—it was never considered a "full indemnity" permitting the court to shift all expenses of litigation to the losing party. *Avery* v. *Wood & Sons*, 65 Law Tim. Rep. 122, 123–24 (1891). The court distinguished cases such as *Hyde* v. *Mayor of Manchester*, 12 C.B. 474 (1852), which involved statutes providing more broadly for "full costs *and expenses*," holding without equivocation that "the term ['full costs'] had been frequently used in Acts of Parliament prior to the Copyright Act of 1842," and that it was "well known to the Legislature" that "the courts of the common law" had interpreted "full costs" "over and over again as meaning merely 'ordinary costs as between party and party,'" *not* the broader notion of expenses "as between attorney and client." *Ibid.* (Lindley, L.J.) (emphasis added). The court attributed this meaning to the Statute of Anne as well (*ibid.*), holding that it was "determined long ago that 'full costs' are the same thing as 'ordinary costs between party and party.'" *Ibid.* (Fry, L.J.).

English authority was also uniform in holding that courts taxing "party and party" costs could not include expert fees. *See Small* v. *Batho*, 21 L.J. (N.S.), Q. B. 254 (1852) (investigator); *Gravat* v. *Attwood*, 21 L. J. (N.S.), Q.B. 215 (1852) (engineers); *Lumb* v.

Simpson, 4 Ex. 85, 85 (1849) (experts who tested "specimens of earths"); *Omerod* v. *Thompson*, 16 M. & W. 860, 860–61 (1847) (surveyor); *May* v. *Selby*, 4 Man. & G. 142, 142–43 (1842); *Severn* v. *Olive*, 3 Brod. & B. 71, 72–75 (1821) ("experiments" by "scientific men"); *see also* Gray, *A Treatise on the Law of Costs*, *supra*, at 502.

2. After the Founding, state laws followed the English practice, including exhaustively detailed lists of which items were taxable, treating the phrase "full costs" as a reference to the *amount* recoverable of the listed items in the statute. These state laws were applied in federal court until 1853. *Alyeska*, 421 U.S. at 250–52.

New York's statute is illustrative. In a case in "the supreme court," what it meant to be a prevailing plaintiff who was "entitled to recover *full costs*," was that the party "*shall recover costs for services mentioned in this act, at and after the rate in this act before prescribed.*" Revised Statutes of New York, ch. X, tit. I, § 7.1 (1846–1848) (enacted in 1830) (emphases added); *see also id.* § 7.3. New York's statute governed the taxation of costs "*as between party and party*," and strictly limited what costs could "be taxed against the ... adversary." *Stevens & Cagger* v. *Adams*, 23 Wend. at 61–62 (N.Y. Sup. Ct. 1840) (emphasis added). There is little question that any costs awarded were, "of course, the costs of an action under the provisions of the Code." *Linn* v. *Clow*, 1857 WL 6360, at *1 (N.Y. Sup. Ct. 1857); *see also Rensselaer & Saratoga R.R.* v. *Davis*, 55 N.Y. 145, 149 (1873) (awarding "full costs" "at the rates prescribed by the Code").

This conclusion is underscored by the fact that statutes such as New York's *also* provided for, in cer-

tain cases, "double costs" or even "treble costs" (Revised Statutes of New York, ch. X, tit. I, § 31; *id.* tit. 5, § 8), meaning that "the effect of the Code, and the sections of the Revised Statutes as to double costs, is that in cases generally, costs are allowed at a certain rate, but in special cases at an increased rate." *Bartle* v. *Gilman*, 18 N.Y. 260, 262 (1858). "Full costs" were simply in contrast to double, treble, "two-thirds" (Revised Statutes of New York, ch. X, Title I, § 7.2), or even "one quarter" costs (Revised Statutes of the Commonwealth of Massachusetts, ch. 121, §§ 4, 8, 18).

3. In 1853, Congress passed the sweeping reforms of the Fee Act to do away with the lack of uniformity in federal cost recovery (*Taniguchi*, 566 U.S. at 565), and from that point forward, federal courts looked to the Fee Act, rather than state law, in determining the types and amounts of available costs.

The Fee Act's expansive language made clear "[t]hat *in lieu of* the compensation now allowed ... in the United States courts, to ... clerks ..., marshals, witnesses, jurors, commissioners, and printers, *in the several States*, the following *and no other compensation shall be taxed and allowed*." Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 161 (emphases added). Congress meticulously regulated, much like many state statutes did prior to the Fee Act, all of the available costs and the rates at which such costs could be taxed. *See id.* at 161–69. The Fee Act, like many state statutes, regulated all taxable costs to the penny.

After the Fee Act, courts recognized that a prevailing party "under the Copyright Act" would receive "full costs," which meant "*all taxable disbursements*." *Basevi* v. *Edward O'Toole Co.*, 26 F. Supp. 41, 50 (S.D.N.Y. 1939) (emphasis added). Other courts acknowledged "full costs" under the Copyright Act to

be "ordinary costs," as opposed to the "extraordinary cost" of attorneys' fees. *Official Aviation Guide Co.* v. *Am. Aviation Assocs.*, 162 F.2d 541, 543 (7th Cir. 1947); *see also Bullinger* v. *Mackey*, 4 F. Cas. 648, 649 (C.C.E.D.N.Y. 1877) (noting "the meagre costs allowed by the laws of the United States" in copyright actions).

4. When Congress passed what is now 17 U.S.C. § 505 in 1831, "full costs" had a well-established meaning. In both English and state practice, "full costs" meant ordinary (or "party and party") costs taxed pursuant to a statutory schedule. "[I]f a word is obviously transplanted from ... other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947); *see, e.g.*, *Hall* v. *Hall*, 138 S. Ct. 1118, 1130 (2018); *United States* v. *Castleman*, 572 U.S. 157, 176 (2014) (Scalia, J., concurring); *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013). It is thus unsurprising that the legislative record contains no contemporaneous explanation of what, at the time, was an everyday phrase in this context.[3]

Importantly, any prevailing plaintiff in the circuit courts (including in copyright cases after 1819) who recovered less than $500 in damages could not recover costs and could be made to pay the other side's costs. Act of 1789, ch. 20, § 20, 1 Stat. 73, 83. Congress eliminated this bar to cost recovery in copyright cases by amending the Copyright Act in 1831 to provide that "in all recoveries under [the copyright statute,] ... *full costs* shall be allowed thereon, *any thing in any former*

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[3] A small number of other modern statutes use the phrase "full costs" in different contexts. *See* 17 U.S.C. § 911(f); 28 U.S.C. § 4001(g); 47 U.S.C. § 553(c)(2)(C); 47 U.S.C. § 605(e)(3)(B)(iii). Neither the text nor the legislative history of these statutes appears to shed any light on the question presented here.

act to the contrary notwithstanding." Act of Feb. 3, 1831, ch. 16, § 12, 4 Stat. 436, 438–39 (emphases added). The "full costs" and *non-obstante* clause referred to the first Judiciary Act's $500 limitation on cost recovery and made clear that it no longer applied. This presumably reflected the reality that statutory damages were set at a mere fifty cents per page of the copyrighted work, which had to be split with the United States government. *Id.* § 6, 4 Stat. 437.

When reenacting the "full costs" provision in the 1909 Copyright Act, the House Report explicitly identified the threshold limitation on cost recovery as the purpose of the "full costs" language:

> The provision for full costs, which is found in the existing law, is necessary in view of the provisions of section 968 of the Revised Statutes, for under that statute when a plaintiff brings an action in a circuit court and recovers less than the sum or value of $500, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value, he shall not be allowed, but at the discretion of the court shall be adjudged to pay, costs.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 19 (1909).

To petitioners' knowledge, there is nothing else in the legislative history of any iteration of the Copyright Act that speaks to this subject. While the understanding of the 1909 Congress might not reflect the intent of the 1831 Congress, it bears noting that the 1909 Congress *reenacted* the "full costs" language with this understanding of its function—one that gives meaning to the term "full" and thus avoids the ostensible

surplusage problem that unduly concerned the Ninth Circuit.

* * *

The text, structure, and history of 17 U.S.C. § 505 conclusively demonstrate that "full costs" means the entire amount of taxable costs authorized under 28 U.S.C. §§ 1920 & 1821—but no more. The much broader and unconstrained meaning attributed to the phrase by the Ninth Circuit cannot be reconciled with this Court's consistent approach to federal cost- and fee-shifting statutes, which requires Congress to speak explicitly when authorizing the award of non-taxable expenses. If Congress had intended "[s]uch a bold departure from traditional practice [it] would have surely drawn more explicit statutory language and legislative comment." *Fogerty*, 510 U.S. at 534.

II. Construing "Full Costs" to Include Non-Taxable Expenses Would Make Bad Policy.

The Ninth Circuit's construction is foreclosed by text, structure, precedent, and history. The Court therefore need not look to policy considerations at all. *E.g.*, *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 13–14 (2000); *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). But to the extent such considerations are relevant, the Ninth Circuit's approach has nothing to recommend it. Allowing non-taxable expenses in copyright litigation would grate against separation-of-powers principles, create an unwarranted rift in federal intellectual property law, and generate significant ancillary litigation. Respondents' *ad hominem* attacks on petitioners cannot override the statutory limitations on judicial authority, and contradict the national uniformity Congress has sought to achieve in copyright cases.

1. Rules that recognize default settings from which Congress may depart in particular circumstances—such as the rule applied in *Crawford Fitting*, *Casey*, and *Murphy*—"exist for good reasons." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). They are rooted in the "separation of powers," and the due "[r]espect" courts must show "for Congress as drafter." *Ibid.* "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Ibid.*; *cf. SCA Hygiene Prod. Aktiebolag* v. *First Quality Baby Prod., LLC*, 137 S. Ct. 954, 960 (2017) ("courts are not at liberty to jettison Congress' judgment").

a. "[R]ules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." *Epic*, 138 S. Ct. at 1624. Such rules of construction are a fundamental component of this Court's jurisprudence involving the harmonization of federal statutes (*e.g.*, *Hall*, 138 S. Ct. at 1130; *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 102 (2012); *Whitman* v. *Am. Trucking Assns., Inc.*, 531 U.S. 457 (2001); *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995); *Morton* v. *Mancari*, 417 U.S. 535 (1974); *United States* v. *Borden Co.*, 308 U.S. 188 (1939)), and have been since the Founding era (*Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842) (Story, J.)). These rules ensure that courts apply Congress's policy preferences rather than their own.

In the context of fees and costs, this is not an idle or abstract principle. Almost immediately after this Court held in *Casey* that 42 U.S.C. § 1988's reference

to attorneys' fees and costs was not a sufficiently clear direction to shift expert witness fees under *Crawford Fitting* (499 U.S. at 87 & n.3), Congress amended the statute to expressly include "expert fees." 42 U.S.C. § 1988(c). Congress thus legislates against the backdrop of this Court's *Crawford Fitting* rule and knows exactly how to provide for the shifting of fees or expenses outside of Sections 1920 and 1821 when it wants to. It cannot be assumed that by using the adjective "full" in the Copyright Act (in 1831, 1870, 1909, or 1976), Congress swept aside the entire architecture of federal cost- and fee-shifting law. Respondents' claim for numerous expenses not listed in Section 1920 is "more properly directed at Congress" than at this Court. *Taniguchi*, 566 U.S. at 573.

b. "[T]he judicial Power of the United States conferred upon [the Supreme] Court and such inferior courts as Congress may establish ... must be deemed to be the judicial power as understood by our common-law tradition." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); *see also, e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011); *N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

"At common law, costs were not allowed." *Alyeska Pipeline*, 421 U.S. at 247. The federal courts have always viewed themselves as generally bound not to shift litigation expenses "till it is changed, or modified, by statute." *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (per curiam). And only those "costs and fees" specifically "allowed by the [relevant] statute" could be shifted. *Oelrichs* v. *Spain*, 82 U.S. (15

Wall.) 211, 230–31 (1872); *see also, e.g.*, *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); *The Baltimore*, 75 U.S. (8 Wall.) 377, 392 (1869); *Flanders* v. *Tweed*, 82 U.S. (15 Wall.) 450, 452–53 (1872).

Because of this "bedrock principle" (*Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010)), this Court "will not deviate from the American Rule absent explicit statutory authority." *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015); *see also Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 137 (2005). In *Fogerty*, which also involved 17 U.S.C. § 505, this Court held that "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar [legal] principles." 510 U.S. at 534. Yet respondents take the extreme position that the bare phrase "full costs" abrogated all recognized limitations on cost recovery. Br. in Opp. 20.

2. Adopting the Ninth Circuit's position would introduce an inexplicable rift in federal intellectual property cost recovery. Costs in trademark infringement suits under the Lanham Act are awarded in accordance with Sections 1920 and 1821. *Nightingale Home Healthcare, Inc.* v. *Anodyne Therapy, LLC*, 626 F.3d 958 (7th Cir. 2010); *PETA* v. *Doughney*, 263 F.3d 359, 371 (4th Cir. 2001); *BASF Corp.* v. *Old World Trading Co.*, 839 F. Supp. 528, 530 (N.D. Ill. 1993), *aff'd*, 41 F.3d 1081 (7th Cir. 1994). The same is true for cost awards in patent infringement suits. *Hildebrand* v. *Steck Mfg. Co.*, 292 F. App'x 921, 923 (Fed. Cir. 2008); *Summit Tech., Inc.* v. *Nidek Co.*, 435 F.3d 1371, 1373 (Fed. Cir. 2006); *Popeil Bros.* v. *Schick Elec., Inc.*, 516 F.2d 772, 773 (7th Cir. 1975); *Emerson* v. *Nat'l Cylinder Gas Co.*, 251 F.2d 152, 158 (1st Cir. 1958).

This Court has consistently construed the copyright and patent laws in tandem unless there is a statutory basis for doing otherwise. *See, e.g.*, *SCA Hygiene*, 137 S. Ct. at 959; *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006). The Ninth Circuit's approach runs counter to these principles by singling out copyright litigation for special treatment, without identifying any copyright policy that would be served by this departure from the rules in other areas of intellectual property litigation. There is also no reason for this distinction at a practical level.

3. This Court has rejected constructions of cost- and fee-shifting statutes, including Section 505 itself, that prove not to be "administrable." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1987 (2016). The core concern reflected here is this Court's "oft-stated concern that an application for attorney's fees should not result in a second major litigation." *Ibid.*

Respondents would invest in district courts an enormous amount of power to shift the often considerable expenses entailed in copyright litigation—jettisoning the certainty of the taxable costs codified in Section 1920 in favor of boundless discretion that would undoubtedly result in significant post-trial litigation. *See* Br. in Opp. i, 1, 13, 16, 23. This Court rejected such an "open-ended" interpretation in *Murphy*, as it would presumably permit "all expenses" incurred by the party, "for example, travel and lodging expenses or lost wages due to time taken off from work." 548 U.S. at 297. And this is no hypothetical concern, as non-taxable expense awards in copyright cases can reach staggering amounts. *E.g.*, *Mattel, Inc.* v. *MGA Entm't, Inc.*, 2011 WL 3420603, at *9 (C.D. Cal. Aug. 4, 2011), *aff'd* 705 F.3d 1108 (9th Cir. 2013)

(awarding more than $31 million out of "approximately $40 million in costs"); *Perfect 10, Inc.* v. *Giganews, Inc.*, 2015 WL 1746484, at *1 (C.D. Cal. Mar. 24, 2015), *aff'd*, 847 F.3d 657 (9th Cir. 2017) ($424,235.47); *Pringle* v. *Adams*, 2014 WL 3706826, at *7–8 (C.D. Cal. July 23, 2014) ($300,096.24). Such awards are a routine, and time-consuming, feature of copyright litigation in the Ninth Circuit. *See* Pet. 19–20 & nn.7–8.

Petitioners' position "is more administrable than" the opposing view. *Kirtsaeng*, 136 S. Ct. at 1987. "[T]he assessment of costs" should be "merely a clerical matter that can be done by the court clerk." *Taniguchi*, 566 U.S. at 573. Imposing the Ninth Circuit's unpredictable scheme nationwide would also upend incentives, making it more difficult for "starving artist[]" rights-holders to assert meritorious claims against "corporate behemoths." *Fogerty*, 510 U.S. at 524. Conversely, a well-heeled plaintiff asserting aggressive claims against a smaller defendant may well bully that defendant into submission before a meritorious defense can be brought to bear.

4. Respondents, bereft of any textual, structural, historical, or even policy arguments that support the Ninth Circuit's conclusion that non-taxable expenses may be awarded in copyright cases, have previously resorted to inflammatory rhetoric instead. They have persisted in attempting to brand petitioners as "bad actors," hurling accusations of "lying under oath," "egregious" behavior, "fake customer[s]," "[un]ambiguous" infringement, and "false[] represent[ations]." Br. in Opp. 1–12, 22–24. This narrative is factually false and legally irrelevant. Rimini was found liable only for *innocent* infringement (JA262), meaning it "was not aware" and "had no reason to believe" that

its conduct was unlawful (JA255–56); and the jury rejected every single claim predicated on supposed misrepresentations or false statements (JA257–71). Ravin has been exonerated of any liability *whatsoever*. JA257–71, JA337–38.

More to the point, respondents' attempts to focus the Court on petitioners' supposed litigation "misconduct," as well as some unspecified "discretion" in the district court to respond to such misconduct, is a ploy to distract the Court from the weakness of respondents' merits argument. Questions of misconduct and discretion to award non-taxable expenses would be relevant *if and only if* Congress has authorized district courts to award non-taxable expenses in *every* copyright case—whether the litigants be angels or devils. If, by contrast, Congress has not authorized the award of non-taxable expenses in *any* copyright case, then the litigants' conduct (or misconduct) is irrelevant.

While district courts in copyright cases have discretion *whether* to award costs, the question presented is whether they also have the authority to go beyond the categories and amounts of taxable costs in 28 U.S.C. §§ 1920 & 1821. The answer is binary—yes or no—as the underlying circuit conflict establishes. *Compare Pinkham*, 84 F.3d at 295 ("no"), *with Twentieth Century Fox*, 429 F.3d at 885 ("yes"). Respondents' *ad hominem* attacks assume that the question can be answered in the affirmative, and therefore that the decision below can be justified as a matter of discretion. If, however, the question is answered in the negative—as petitioners maintain it should be—then the district court had no *power* to award non-taxable expenses, and respondents' appeals to "discretion" are a red herring. The district court's only discretionary

decision is to award or not to award taxable costs. *See Taniguchi*, 566 U.S. at 573. And petitioners here do not challenge any exercise of discretion by the district court.

Respondents' emphasis on "discretion" also highlights a fundamental flaw in the Ninth Circuit's approach. While District Judge *A* may view an expense as proper, District Judge *B* may not. Shifting the expense in one case but not another would undermine not only "the uniformity Congress sought to achieve" under the Copyright Act (*Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681 (2014)), but also the "uniform rule" which Congress adopted for cost recovery in *all* litigation, spurred on to stop, not encourage, the "great diversity in practice among [the federal district] courts" that precipitated the Fee Act of 1853. *Taniguchi*, 566 U.S. at 565. Congress has already made the considered policy judgment that only *costs* and *attorneys' fees* can be shifted in Copyright Act cases; any additional adjustments to that regime must come from the Legislature, not the Judiciary.

* * *

To reiterate, Congress's policy of uniformity can be overridden only by an "explicit statutory ... authorization." *Crawford Fitting*, 482 U.S. at 445. Such explicit authorization is entirely lacking in 17 U.S.C. § 505. To the contrary, *all* evidence points to the conclusion that "full costs" in the Copyright Act means all the *taxable* costs incurred by the prevailing party—no more and no less.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it affirmed the award of $12.8 million in non-taxable expenses.

Respectfully submitted.

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STATUTORY ADDENDUM

17 U.S.C. § 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

28 U.S.C. § 1821. Per diem and mileage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government

shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not

in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provisions of section 3144 of title 18 apply) may not receive fees or allowances under this section, regardless of whether such a witness is incarcerated at the time he or she makes a claim for fees or allowances under this section.

28 U.S.C. § 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.